No. 78-1299

In the Supreme Court of the United States

OCTOBER TERM, 1978

91.90 ACRES OF LAND, SITUATE IN MONROE COUNTY, MISSOURI, AND WALSH REFRACTORIES CORPORATION, C-E REFRACTORIES AND COMBUSTION ENGINEERING, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-25) is reported at 586 F. 2d 79.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1978. A timely petition for rehearing was denied on December 11, 1978 (Pet. App. A-26). The petition for a writ of certiorari was filed on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether just compensation for property condemned in part is measured by the condemnee's increased

costs of doing business on the remainder of his land, or by the difference in market value of the property before and after the taking.

2. Whether the court of appeals properly ruled that testimony as to the value of a clay deposit figured by the estimated number of tons multiplied by a fixed value per ton based on market price was too speculative to be admissible.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

On December 16, 1976, the United States filed a Complaint and Declaration of Taking to condemn for the Cannon Dam and Reservoir project 87.89 acres in fee and a flowage easement over an additional 4.01 acres (Pet. 3; Pet. App. A-10). The condemned property was part of a 140-acre tract owned by petitioner, a manufacturer of firebrick and other high-temperature-resistant clay products (Pet. App. A-9). The 140-acre tract included the only deposit of a particular kind of soft plastic clay known to exist in Missouri (Pet. 3). Petitioner had never marketed the clay, but used it as a supply source for its own refractory plant (Tr. 22). Since 1970, petitioner had removed 15,000 tons of clay from the 140-acre tract and had stripped another 10,000 tons for removal as needed (Tr. 72, 97, 112).[1] The portion of the tract condemned by the government contains no clay,

[1]Petitioner's total requirement for soft plastic clay during the 25 years prior to condemnation had been 165,000 tons (Tr. 113-114). Except for 15,000 tons, the amount was obtained from deposits other than the 140-acre tract (Tr. 114).

although it contains several streams and two natural ravines (Pet. App. A-9 to A-10). The entire clay deposit is concentrated within a 20-acre area on the 50-acre tract to which petitioner retains full title (Pet. App. A-10 to A-11 & n.2).[2]

A four-day jury trial was conducted in October 1977, at which undisputed evidence established that the highest and best use of the property was for clay mining (Pet. 5). Petitioner argued that in order to mine the deposit on the 50-acre tract efficiently, it had intended to use the entire 140-acre tract, pushing the overburden from the mine into the ravines on the 90-acre tract. Petitioner claimed that the condemnation of the 90-acre tract required it to adopt more costly mining methods and thus diminished the value of the 50-acre tract, entitling petitioner to severance damages.

Petitioner's witnesses testified that under the revised plan for mining using only the 50-acre tract, the total deposit of approximately 327,000 tons of clay would be stripped one-third at a time, and that because the overburden would all have to be stored on the 50-acre tract, about 44,000 tons of clay would be covered by overburden and thus rendered unrecoverable (Tr. 39, 41, 105, 116). Two witnesses for petitioner estimated that the clay had a value of $1.85 or $1.95 per ton based on the market value price, and accordingly that the value of the 44,000 tons which would be unrecoverable under the new mining plan was more than $80,000 (Tr. 39-40, 104-105, 183). The witnesses also explained that the revised plan would necessitate the construction of a road to transport the overburden, settling ponds, a drainage moat, and pumps (Tr. 36-43, 105-106).

[2]We will follow the court of appeals' practice of referring to the tract acquired by the government as the "90-acre" tract, and the tract retained by petitioner as the "50-acre" tract (see Pet. App. A-10).

Petitioner then presented four valuation witnesses who testified to the difference in the value of the property before and after the taking. Each of the witnesses testified that the surface value of the entire parcel was approximately $1,000 per acre, or a total of $140,000, to which they added the value of the clay deposit. From this asserted total value of the property before the taking, the witnesses subtracted the costs attributable to the revised mining plan, including the loss of 44,000 tons of clay and the loss of the surface value of 90 acres, and they thus concluded that the difference in the value of the property before and after the taking was between $537,000 and $574,000 (Tr. 180-183, 203-204, 220, 227-228).

The government contended that the condemnation of the 90-acre tract would not affect the mining of the deposit on the 50-acre tract, that the entire deposit on the 50-acre tract could be mined, and that even if part of the deposit would be unrecoverable, the loss to petitioner would be only the royalty value, not $1.85 or $1.95 per ton. The government's expert witness on clay mining explained that the normal procedure—which petitioner had followed prior to the condemnation—was to strip only two to three acres at a time, exposing 10,000 to 25,000 tons (Tr. 313-317, 335, 352). The witness noted that this practice would amply keep pace with petitioner's requirements, which had averaged about 6,000 tons per year for the past 25 years (Tr. 113, 354). If the remaining deposit on the 50-acre tract was mined according to this customary method, the witness explained that the overburden, which would cover only a small area, could be returned to each mined-out pit so that no part of the clay deposit would be unrecoverable. The witness also stated that multiplying the estimated amount of clay in place by a unit value based on market price was an incorrect method of valuing a mineral deposit, and

that the royalty rate—that is, what the mineral owner would be paid by one who purchased the right to mine—was the customary basis for calculating the value of clay in place (Tr. 300, 308).

Relying on this testimony that the value of the 50-acre tract would not be affected by the condemnation of the 90 acres, the government's valuation witnesses concluded that the value of the condemned property was approximately $30,000, which they calculated on the basis of the sale price of comparable adjacent farm land (Tr. 370-376, 411).

The jury returned a verdict of $245,966.00 as just compensation (Pet. App. A-8).

The court of appeals reversed, holding that the district court had committed "plain and fundamental error" in allowing petitioner to present improper evidence of valuation and in failing to provide the jury with limiting instructions (Pet. App. A-21 to A-24). First, the court concluded that the additional costs of the method petitioner planned to use in mining the clay on the 50-acre tract—including the inability to recover 44,000 tons of clay—were consequential damages, which are not compensable (Pet. App. A-22). Second, the court pointed out that petitioner's witnesses had included the surface value of the entire 140-acre tract in their calculation of the value of the property before condemnation, but had erroneously omitted from their calculation of the after-taking value the surface value of the 50-acre tract remaining after the taking (*ibid.*). Finally, the court held that the trial court had erred in admitting the testimony that the value of the 44,000 tons that would allegedly be unrecoverable was the number of tons multiplied by the value per ton, because this evidence was "too speculative to be admissible" (*ibid.*). Although the existence of minerals was a factor in determining the

value of the property, the value of the mineral deposit could be considered only to the extent if affected the overall market value of the property (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 13-17) that the court of appeals erred in holding that the increased cost of petitioner's revised mining plan for the 50-acre tract was not compensable. We disagree.

When the government acquires only a portion of a tract, just compensation includes not only the value of the portion taken, but also any diminution in value of the remainder. *United States* v. *Dickinson*, 331 U.S. 745, 750-751 (1947); *United States* v. *Grizzard*, 219 U.S. 180, 183 (1911). Just compensation is the difference in the market value of the property before and after the taking. *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 632 (1961); *United States* v. *Miller*, 317 U.S. 369, 376 (1943).

The court of appeals correctly held (Pet. App. A-22 to A-23), however, that the increased costs occasioned by petitioner's revised plan for mining on the 50-acre tract it retained were consequential damages that are not a proper element of just compensation. It is well settled that consequential losses to the landowner are not compensable under the Fifth Amendment. See, *e.g.*, *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 11-12 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378 (1946). And no award is required to compensate the owner for the frustration of his plans for the use of the premises. *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 284 (1943). As the court of appeals pointed out (Pet. App. A-22 to A-23), petitioner was entitled to show that the entire tract was valuable because of the clay deposit, that the entire tract could be mined most efficiently by making use of the 90 acres that were condemned, and

accordingly that the value of the 50 acres petitioner retained had been somewhat decreased by the condemnation. The court correctly observed that these considerations would affect the market value of the 50-acre tract (*ibid.*). But petitioner was not entitled to prove the costs of its revised mining plan *as an element of the award*, since those costs "did not result from the taking, but from [petitioner's] decision to continue to mine clay from the 50-acre tract and to do it in a certain way" (Pet. App. A-22).[3]

2. Petitioner also contends (Pet. 7-13) that the court of appeals erred in holding (Pet. App. A-22) that the evidence of the tonnage of the clay in the ground multiplied by a fixed unit value, as a means of valuing the clay that would assertedly be rendered unrecoverable, was too speculative to be admissible.[4]

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[3]None of the cases cited by petitioner (Pet. 16-17) are inconsistent with the court of appeals' decision. The portion of the opinion petitioner cites from *Southern Pacific Ry.* v. *San Francisco Savings Union*, 79 P. 961, 962-963, 146 Cal. 290 (1905), is from the court's discussion of the value of an easement condemned over mineral land. The California court, like the court of appeals here, stated that if the condemnation made mining of the minerals underlying the easement more difficult, this would be a factor affecting the market value of the servient estate that the condemnee retained. And in *Seattle & M.R.* v. *Roeder*, 70 P. 498, 501, 30 Wash. 244 (1902), the state court likewise stated that evidence of the difficulty of mining the remainder of the tract after part was condemned would be admissible to show "how much less valuable the quarry left would be" after the condemnation. Neither case holds, as petitioner urges, that all of the costs of a revised method of operation are compensable damages. Finally, *United States* v. *403.14 Acres in St. Clair County*, 553 F. 2d 565 (8th Cir. 1977), is inapposite, since it concerned the condemnation of farmland.

[4]Moreover, although the court of appeals did not discuss this point, the value of the clay that would not be recoverable under petitioner's revised mining plan, like the other costs of the revised plan, would be consequential damages that are not themselves compensable, although the fact that portions of the clay might be difficult or impossible to recover on the 50-acre tract would affect the market value of the tract.

This claim is insubstantial. As the court of appeals recognized (Pet. App. A-22), evidence of the value of a mineral deposit calculated by multiplying tonnage times a unit value based on the current market price is premised on speculation regarding the continuing existence of a market for the mineral under the same conditions as at present. See *United States* v. *Sowards*, 370 F. 2d 87, 90 (10th Cir. 1966); *Mills* v. *United States*, 363 F. 2d 78, 81 (8th Cir. 1966); *Georgia Kaolin Co.* v. *United States*, 214 F. 2d 284, 286 (5th Cir. 1954), cert. denied, 348 U.S. 914 (1955). The unit-times-value method is proper only where conjecture is eliminated by objective evidence of the extent, duration, and substantiality of the future market for the mineral. See *United States* v. *Whitehurst*, 337 F. 2d 765, 771-772 (4th Cir. 1964). Without such a basis in the record, this method does not establish the value of the mineral deposit in place. *United States* v. *45,131.44 Acres of Land, More or Less, in El Paso*, 446 F. 2d 24, 25-26 (10th Cir. 1971); *Mills* v. *United States*, *supra*, 363 F. 2d at 80-81.[5] Since petitioner

[5]There is no merit to petitioner's contention that the court of appeals' decision is inconsistent with the decisions of other circuits. In *United States* v. *2,847.58 Acres of Land*, 529 F. 2d 682, 686-687 (6th Cir. 1976), the court expressly distinguished *Mills* and *Sowards*, *supra*, on the ground that in those cases no showing of a market for the mineral deposit had been made, whereas in *2,847.58 Acres* there had been testimony that selling an entire deposit of oil in place at a specified price per barrel was a common practice. And in *Cade* v. *United States*, 213 F. 2d 138, 142 (4th Cir. 1954), the court found there had been a proper foundation by testimony of the demand for the rock. Finally, in *National Brick Co.* v. *United States*, 131 F. 2d 30, 31 (1942), the court of appeals held the district court—which "was originally of [the] opinion that the presence on the property of the sand bank forty to ninety feet high, containing 300,000 cubic yards of pure sand was of no consequence in determining the value of the property taken"—had erred in excluding all testimony regarding the value of the deposit, including the response to the question, what is "the value of the sand per ton 'in the bank just as it is now?' "

failed to introduce evidence of the continuing demand for the clay, or for its own products that it manufactured using the clay, the unit-times-tonnage evidence introduced an improper element of speculative damages.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioner also disagrees (Pet. 18-19) with the court of appeals' conclusion that petitioner's expert witnesses omitted the value of the surface estate from their calculation of the value of petitioner's land after the condemnation. Petitioner interprets the testimony of its witnesses as implicitly including the surface value in the after-taking figure. Even if we assume that petitioner's interpretation of this testimony is correct, any resulting error by the court of appeals would not present an issue warranting review by this Court. Indeed, petitioner agrees with the court's legal ruling that on retrial the surface value should be included in the value of the property after taking.

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